Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–264 OF 1999
BALIA YUSOF J
6 DECEMBER 2006

Civil Procedure — Security — Plaintiff company in liquidation — Whether security for costs should be ordered — Whether amount of security was excessive and oppressive

Civil Procedure — Security — Security for plaintiff's costs — Plaintiffs in liquidation and bankrupt — Whether security for costs should be ordered — Whether amount of security was excessive and oppressive

Civil Procedure — Security for costs — Place of residence of plaintiff — Plaintiff's address not stated in writ or other originating process or incorrectly stated — Whether court must order security for costs — Rules of the High Court 1980 O 23 r 1

A fire broke out in the premises of the first plaintiff and arising from that claims were made against the fourth defendant as insurers. The first defendant was the legal advisor to the insurers while the second and third defendants were the investigators appointed to investigate the losses and the cause or causes of the fire. The plaintiffs had filed a claim against the defendants seeking for damages, the value of the insured sum, injunction and certain declaration in this suit as well as in four other suits all at the Ipoh High Court. The second and third plaintiffs were the directors of the first plaintiff and it was against these three plaintiffs that the defendants were asking for security for costs. The first plaintiff had been wound up on 12 March 2001 and a sanction was given by the Jabatan Insolvensi on 1 April 2004 under the provisions of the Companies Act 1965 for it to proceed with the claim. In granting the sanction, the Jabatan Insolvensi had asked for a sum of RM2,000 to be deposited as security for costs for all the five suits filed by the plaintiffs. The second and third plaintiffs were declared bankrupt on 12 March 2002 and 29 January 2002 respectively and still remained so at the time of the application by the defendants. The defendant had stated in the affidavit in support of the application that both the second and third plaintiffs had given different addresses at different times. The learned deputy registrar had ordered the sum of RM20,000 against the first plaintiff and RM10,000 against each of the second and third plaintiffs. The amount was against each of the applicant and in its totality the first plaintiff would have to fork out RM200,000 against the ten applications while the second and third plaintiff would each have to provide RM100,000 as security for all the ten applications filed against them. The first, second and third plaintiffs and the fourth defendant appealed. The four defendants had sought for security for costs against the first, second and third plaintiff in the sum of between RM250,000 and RM300,000. The fourth defendant's solicitors had also put up a draft bill of costs for RM250,000.

Held, dismissing the appeals:

(1) It was established and admitted that the first plaintiff was in liquidation. Accordingly it was for plaintiff to satisfy the court why security for costs should not be ordered. There were no sufficient grounds to satisfy the court why security for costs should not be ordered. The fact that the first plaintiff had paid RM2,000 as security for costs to the Jabatan Insolvensi was insufficient ground why security for costs should not be ordered. His plea that the first plaintiff was in liquidation and that the other two plaintiffs were bankrupts and therefore should not be further burdened by ordering security for costs clearly was an admission that the first plaintiff was unable to pay the costs. Further, an application for security for costs in the instant case was not an abuse of the court's process. The plaintiff had failed to give sufficient evidence to show how it would be prejudiced by the application. There was not an iota of evidence that could tilt the scale in their favour and there was also nothing in the affidavit to indicate that the plaintiffs would as a result of this order suffer injustice or that it would stifle its claim or that the order would be oppressive. Worse still, there was nothing in the affidavit in reply to show its ability to pay the costs in the event it were to fail in its claim against the defendants (see para 13).

(2) Order 23 r 1 of the Rules of the High Court 1980 is not a carte blanche provision empowering the court to order security for costs in all cases where the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated. To order for security under the said rule the court must have regard to all the circumstances of the case and that the court thinks it is just to do so. Having different addresses per se is not a ground as envisaged under O 23 and there was no evidence to suggest that the plaintiffs had been changing addresses to evade the consequence of the litigation. It was also not suggested that the plaintiffs' address in the writ was incorrectly stated. In the same token there was also no plausible reason or explanation given by the plaintiffs as to the existence or usage of the different addresses (see para 19).

(3) Both the second and third plaintiffs had been declared bankrupts and the court could understand the defendant's apprehension over the plaintiffs' ability to meet any order as to costs which the court may make. However, it is trite that the plaintiffs' impecuniousity by itself is not a sufficient ground for the court to make an order for security for costs (see para 20).

(4) The amount of between RM250,000 to RM300,000 sought for by the defendant was excessive and would be oppressive to the plaintiffs as they were and considering further of the number of applications filed by the different defendants against them. In the light of those circumstances, the amount of RM20,000 against the first plaintiff and RM10,000 against each of the second and third plaintiffs as security for costs was a reasonable amount (see para 25).

[Bahasa Malaysia summary

Satu kebakaran telah berlaku di premis plaintif pertama dan berlanjutan daripada itu tuntutan dibuat terhadap defendan keempat sebagai syarikat insuran. Defendan pertama adalah penasihat perundangan kepada syarikat insuran manakala defendan

kedua dan ketiga adalah penyiasat yang dilantik untuk menyiasat kerugian dan punca atau punca-punca kebakaran. Plaintif telah menfailkan tuntutan terhadap defendan-defendan memohon untuk gantirugi, nilai jumlah yang diinsurankan, injuksi dan beberapa deklarasi di dalam tindakan ini begitu juga di dalam empat tindakan lain yang kesemuanya di Mahkamah Tinggi Ipoh. Plaintif kedua dan ketiga adalah pengarah-pengarah kepada plaintif pertama dan terhadap ketiga-tiga plaintif, defendan-defendan memohon untuk jaminan kos. Plaintif pertama telah digulungkan pada 12 Mac 2001 dan kebenaran telah diberikan oleh Jabatan Insolvensipada 1 April 2004 di bawah peruntukan Akta Syarikat 1965 untuk meneruskan dengan tuntutan. Dalam memberikan kebenaran, Jabatan Insolvensi meminta sejumlah RM2,000 didepositkan sebagai jaminan kos untuk kesemua lima tindakan yang difailkan oleh plaintif-plaintif. Plaintif kedua dan ketiga masing-masing telah diisytiharkan bankrap pada 12 Mac 2002 dan 29 Januari 2002 dan tetap sama pada masa permohonan oleh defendan-defendan. Defendan telah menyatakan di dalam afidavit sokongan permohonan tersebut bahawa kedua-dua defendan kedua dan ketiga telah memberikan alamat yang berbeza pada masa yang berlainan. Timbalan pendaftar yang bijaksana telah memerintahkan sejumlah RM20,000 terhadap plaintif pertama dan RM10,000 terhadap setiap seorang untuk plaintif kedua dan ketiga. Jumlah tersebut adalah terhadap setiap permohonan dan secara keseluruhan plaintif pertama perlu membayar RM200,000 terhadap sepuluh permohonan manakala plaintif kedua dan ketiga setiap seorang perlu menyediakan RM100,000 sebagai jaminan untuk kesemua sepuluh permohonan yang difailkan terhadap mereka. Plaintif pertama, kedua, ketiga dan defendan keempat telah merayu. Empat defendan telah meminta untuk jaminan kos terhadap plaintif pertama, kedua dan ketiga, lebih kurang di antara sebanyak RM250,000 dan RM300,000. Peguamcara defendan keempat juga menyediakan draf bil kos sebanyak RM250,000.

Diputuskan, menolak rayuan perayu:

(1) Adalah sesuatu yang mantap dan diakui bahawa plaintif pertama telah dibubarkan. Seharusnya ianya adalah untuk plaintif untuk memuaskan hati mahkamah mengapa jaminan kos tidak perlu diperintahkan. Terdapatnya alasan yang tidak mencukupi untuk memuaskan hati mahkamah mengapa jaminan kos tidak perlu diperintahkan. Fakta di mana plaintif pertama telah membayar RM2,000 sebagai jaminan kos kepada Jabatan Insolvensi adalah alasan yang tidak mencukupi mengapa jaminan kos sepatutnya tidak diperintahkan. Rayuannya bahawa plaintif pertama telah dibubarkan dan bahawa dua plaintif yang lain telah bankrap maka seharusnya tidak perlu dibebani lagi dengan diperintahkan jaminan kos dengan jelasnya satu pengakuan bahawa plaintif pertama adalah tidak mampu untuk membayar kos. Tambahan pula, permohonan untuk jaminan kos dalam kes ini bukanlah penyalahgunaan proses mahkamah. Plaintif telah gagal untuk memberikan bukti yang mencukupi untuk menunjukkan bagaimana ianya diprejudiskan melalui permohonan tersebut. Tiada sekelumit bukti bahawa yang memberatkan timbangan bagi pihak mereka dan juga tiada di dalam afidavit yang menyatakan bahawa plaintif-plaintif kesan daripada perintah tersebut mengalami ketidakadilan atau menyekat permohonannya atau perintah

tersebut bersifat menindas. Lebih buruk lagi, tiada di dalam afidavit balasan untuk menunjukkan kemampuannya untuk membayar kos jima mana mereka gagal dalam tuntutannya terhadap defendan-defendan (lihat perenggan 13).

(2) Aturan 23 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 bukanlah satu peruntukan bersifat 'carte blanche' yang memberikan kuasa kepada mahkamah untuk memerintahkan jaminan kos di dalam kesemua kes yang mana amalat plaintif tidak dinyatakan di dalam writ atau proses pemula yang lain atau ianya salah dinyatakan. Untuk memerintahkan jaminan kos mahkamah mestilah mengambil kira semua keadaan kes dan mahkamah memikirkan adil melakukannya. Mempunyai alamat yang berbeza sahaja bukanlah satu alasan yang dibayangkan di bawah A 23 dan tidak terdapatnya bukti yang mencadangkan bahawa plaintif-plaintif menukar alamat untuk mengelak daripada akibat litigasi. Ianya juga tidak dicadangkan bahawa alamat plaintif-plaintif di dalam writ adalah salah dinyatakan. Dalam sebab yang sama terdapatnya alasan yang tidak munasabah atau penjelasan yang diberikan oleh plaintif–plaintif atas kewujudan atau penggunan alamat yang berbeza (lihat perenggan 19).

(3) Kedua-dua plaintif kedua dan ketiga telah diisytiharkan bankrap dan mahkamah dapat memahami kebimbangan defendan-defendan terhadap kemampuan defendan-defendan untuk memenuhi apa-apa perintah berkenaan dengan kos yang berkemungkinan mahkamah memberikannya. Walaubagaimanapun, adalah suatu yang lapuk keadaan plaintif-plaintif yang tidak berduit hanya dengan itu bukanlah alasan yang mencukupi untuk mahkamah membuat perintah untuk jaminan kos (lihat perenggan 20).

(4) Jumlah di antara RM250,000 hingga RM300,000 yang diminta oleh defendan adalah berlebih-lebihan dan berkemungkinan tekanan kepada plaintif-plaintif sebagaimana keadaan mereka dan seterusnya mengambil kira bilangan permohonan yang difailkan oleh defendan yang berbeza terhadap mereka. Berdasarkan keadaan tersebut, jumlah RM20,000 terhadap plaintif pertama dan RM10,000 terhadap plaintif kedua dan ketiga setiap seorang sebagai jaminan kos adalah jumlah yang munasabah (lihat perenggan 25).]

Notes

For a case on security, plaintif company in liquidation see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2108.

For a case on security for costs, place of residence of plaintiff see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2120.

For cases on security, security for plaintiff's costs see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2116-2117.

Cases referred to

Ashin Sdn Bhd v Datuk Bandar Kuala Lumpur & Ors [1999] 5 MLJ 663 (refd)
Faridah Begum bte Abdullah v Dato Michael Chong [1995] 2MLJ 404 (refd)
Goldquest International Ltd v TehLeong Kiat [2003] MLJU 132 (refd)
Government of Sarawak v Sami Mousawi Utama Sdn Bhd [1998] 3 MLJ 820 (refd)
Gula Perak Bhd v Agri-Projects (M) Sdn Bhd [1989] 1 MLJ 422 (refd)

KD Resources Sdn Bhd v Ng Boon Jieh & Son Realty Sdn Bhd & Anor [2002] MLJU 627 (refd)
Keary Developments Ltd v Tarmac Construction Ltd & Anor [1995] 3 All ER 534 (refd)
New Zealand Insurance Co Ltd v Ong Choon Lin [1992]1 MLJ 85 (refd)
Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 (refd)
Procon (Great Britain) Ltd v Provincial Building Co Ltd & Anor [1984] 1 WLR 557 (refd)
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273; [1973] QB 609 (refd)
Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ (refd)
Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya [2001] 3 MLJ 344 (refd)
Thune & Anor v London Properties Ltd. & Ors [1990] 1 All ER 972 (refd)
Tradestock Private Ltd v TNT (Management) Private Limited & Ors 14 ALR 52 (refd)
Unisoft Group Ltd, Re (No 2) [1993] BCLC 532 (refd)

Legislation referred to

Australian Companies Act s 363(1)
Companies Act 1965 s 351 (1)
Rules of the High Court 1980 O 23 r 1, O 92 r 4

Ahmad Yani bin Aminuddin (Ngan Siong Hing and Ridzuan with him) (Abbas & Ngan) for the plaintiffs.
Muhammad Faizal Moideen (Shook Lin & Bok) for the first defendant.
Jack Yow (Shearn Delamore & Co) for the second defendant and for the second defendant in the case No 22–265 of 1999 and 22–267 of 1999.
B Balakumar (Azim, Tunku Farik & Wong) for the third defendant and for the defendant in the case No 22–28 of 2000.
Sreether Sundaram (Murali B Pillai & Associate) for the fourth defendant.
Joyce Uma (Cheang & Arif) for the fourth defendant in the case No 22–265 of 1999.
Ratnavathy (Matthew Thomas & Co) for the fourth defendant in the case No 22–266 of 1999.
Al-Muhammad Mukmin for the Insolvency Department.

Balia Yusof J:

[1] Altogether five appeals were filed in this suit, four by the first, second and third plaintiffs (encls 153, 154, 155 and 156) and one by the fourth defendant (encl 162) against the decision of the learned Timbalan Pendaftar given on 24 November 2005. The first four appeals by the first, second and third plaintiffs are against the order whereby the first, second and third plaintiffs were ordered to deposit in court a sum of RM20,000, RM10,000 and RM10,000 respectively as security for costs. While the appeal in encl 162 is by the fourth defendant contending that the amount of security ordered by the learned Timbalan Pendaftar was inadequate and ought to be increased.

[2] Together with the above, four other suits were heard together namely Suit Nos 22–265–99, 22–266–99, 22–267–99 and 22–28–00.

[3] There are two appeals in Suit No 22–265–99 vide encls 121 and 122, another two appeals in Suit No 22–266–99 vide encls 116 and 117 and one appeal each in Suit Nos 22–267–99 and 22–80–00 vide encls 110 and 39 respectively. All the six appeals in these other four suits are filed by the first, second and third plaintiffs against the same order of the Timbalan Pendaftar made on 24 November 2005 allowing the different defendant's application for security for costs against the first, second and third plaintiffs.

[4] For ease of reference, the various suits referred to above are tabulated as follows:

Suit No	Plaintiffs	Defendants
22–264–99	1. Doree Industries (M) Sdn Bhd	1. Sri Ram & Co
	2. Wong Kong Heow	2. Thomas Howell Group (M) Sdn Bhd
	3. Sam Chee Yean	3. Forensic Service (M) Sdn Bhd
	4. Patrik Foo Kit Sin	4. Aetna Universal Insurance Berhad
22–256–99	1. Doree Industries (M) Sdn Bhd	1. Sri Ram & Co
	2. Wong Kong Heow	2. Thomas Howell Group (M) Sdn Bhd
	3. Sam Chee Yean	3. Forensic Service (M) Sdn Bhd
	4. Patrik Foo Kit Sin	4. MBF Insurance Bhd
22–266–99	1. Doree Industries (M) Sdn Bhd	1. Sri Ram & Co
	2. Wong Kong Heow	2. Thomas Howell Group (M) Sdn Bhd
	3. Sam Chee Yean	3. Forensic Service (M) Sdn Bhd
	4. Patrik Foo Kit Sin	4. Arab Malaysia Assurance Bhd
22–267–99	1. Doree Industries (M) Sdn Bhd	1. Sri Ram & Co
	2. Wong Kong Heow	2. Thomas Howell Group (M) Sdn Bhd
	3. Sam Chee Yean	3. Forensic Service (M) Sdn Bhd
	4. Patrik Foo Kit Sin	4. Mayban Assurance Bhd
22–28–00	1. Doree Industries (M) Sdn Bhd 2. Wong Kong Heow 3. Sam Chee Yean 4. Patrik Foo Kit Sin	Mayban Assurance Bhd

[5] The application for security for costs against the plaintiffs is made pursuant to the provisions of s 351(1) of the Companies Act 1965 and O 23 of the Rules of the

High Court 1980. The fourth defendant has also cited O 92 r 4 of the same rules in the application.

FACTS OF THE CASE

[6] A fire broke out in the premises of the first plaintiff and arising from that claims were made against the fourth defendant as insurers. The first defendant is the legal advisor to the insurers while the second and third defendants are the investigators appointed to investigate the losses and the cause or causes of the fire. The plaintiffs have filed a claim against the defendants seeking for damages, the value of the insured sum, injunction and certain declaration in this suit as well as in four other suits all at the Ipoh High Court. The second and third plaintiffs are the directors of the first plaintiff and it is against these three plaintiffs that the defendant is asking for security for costs. The fourth plaintiff is the manager of the first plaintiff and is not involved in this application.

[7] The first plaintiff has been wound up on 12 March 2001 and a sanction was given by the Jabatan Insolvensi on 1 April 2004 under the provisions of the Companies Act 1965 for it to proceed with the claim. The second and third plaintiffs were declared bankrupt on 12 March 2002 and 29 January 2002 respectively and still remain so at the time of the application by the defendants. It is noted in granting the sanction, the Jabatan Insolvensi has asked for a sum of RM2,000 to be deposited as security for costs for all the five suits filed by the plaintiffs.

AGAINST THE FIRST PLAINTIFF

[8] The application for security for costs against the first plaintiff is made pursuant to s 351(1) of the Companies Act 1965 which provides:

> Where a company is a plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[9] In interpreting the abovementioned provision the Court of Appeal in *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 at p 657 noted that:

> As may be seen, and this is borne by the authorities decided upon the parallel provisions in other common law jurisdictions, the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, where found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

[10] It is without doubt that the power to order security for costs lies at the discretion of the court and it is simply a discretion which ought to be exercised in all the circumstances of the case. In exercising its discretion, the court had to balance the

threat that an impecunious company could put unfair pressure on a defendant against the wrong that would be caused to a company which was successful and should not have borne any costs at all (*Re Unisoft Group Ltd (No 2)* [1993] BCLC 532). Smithers J in *Tradestock Private Ltd v TNT (Management) Private Limited & Ors* 14 ALR 52 at p 56 in expressing his views on s 363(1) of the Australian Companies Act which is identical with our s 351 and is in pari materia with the English s 447 states:

> It is clear, however, that the real problem is to determine whether, in the circumstances of that case, the court ought to take the view that the protection should not be afforded to the defendant. No doubt the answer is to be found by ascertaining where, on considerations of what is just and reasonable, the balance rests between the risk of exposing an innocent defendant to the expense of defending his position and the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in his obtaining that relief.

[11] To add to the list of authorities, reference must also be made to *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273; [1973] QB 609 and *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 which were extensively dealt with by my learned brother Ian Chin J in *Government of Sarawak v Sami Mousawi Utama Sdn Bhd* [1998] 3 MLJ 820.

[12] Having considered the facts before me and the evidence adduced, I have no hesitation is coming to the conclusion that there is credible evidence and that credible evidence supports the belief that the first plaintiff will be unable to pay the costs of the defendants. The status of the first plaintiff is proven and readily admitted by counsel. Abdul Malik Ishak J in *KD Resources Sdn Bhd vNg Boon Jieh & Son Realty Sdn Bhd & Anor* [2002] MLJU 627 at p 7 stated:

> According to Jessel MR in *Northampton Coal, Iron & Waggon Company v. Midland Waggon Co* [1878] 7 Ch D 500, p 503, the fact that the company was in liquidation would be sufficient reason to believe that the assets of the company would be insufficient to pay for the costs of the proceedings.

[13] Once it is established that it will be unable to pay the costs, the onus is on the plaintiff to satisfy the court why security for costs should not be ordered (see *Gula Perak Bhd v Agri-Projects (M) Sdn Bhd* [1989] 1 MLJ 422). In the instant case, it is established and admitted that the first plaintiff is in liquidation. Accordingly, it is for plaintiff to satisfy the court why security for costs should not be ordered. The affidavit in reply was filed by the former Managing Director of the first plaintiff who is also named as the second plaintiff in the case. My perusal of the said affidavit (encl 126) does not indicate sufficient grounds to satisfy the court why security for costs should not be ordered. The fact that the first plaintiff has paid RM2,000 as security for costs to the Jabatan Insolvensi is insufficient ground why security for costs should not be ordered. His plea that the first plaintiff is in liquidation and that the other two plaintiffs are bankrupts and therefore should not be further burdened by ordering security for costs clearly is an admission that the first plaintiff's are unable to pay the costs. Further, I do not see how an application for security for costs in the instant case could be an abuse of the court's process. The plaintiff has failed to give sufficient evidence to show how it would be prejudiced by the said application.

There is not an iota of evidence that can tilt the scale in their favour and there is also nothing in the affidavit to indicate that the plaintiff would as a result of this order suffer injustice or that it would stifle its claim or that the order would be oppressive. Worse still, there is nothing in the affidavit in reply to show its ability to pay the costs in the event it were to fail in its claim against the defendants.

[14] As observed by Kamalanathan Ratnam J in *Strukturmas (Selangor) Sdn Bhd v Majlis Perbandaran Petaling Jaya* [2001] 3 MLJ 344:

> it is important that when an application is made by a party for security for costs against another, the opposing party must state affirmatively that it would be in a position to pay the taxed cost preferably with supporting documents showing its ability to pay the costs. In this case, the plaintiff has maintained a discreet silence. The only inference the court can draw is that the plaintiff was unwilling to put in print its admission of its inability to pay the taxed costs.

[15] In the light of the above circumstances, I hold that the first plaintiff has failed to discharge the burden cast on it to satisfy the court why an order for security for costs ought not to be made.

AGAINST THE SECOND AND THIRD PLAINTIFFS

[16] Against the second and third plaintiffs, the defendant has cited O 23 r 1 and O 92 r 4 of the Rules of the High Court 1980 for an order for security for costs to be made. The relevant parts of O 23 upon which the application is premised are as follows:

> Security for costs of action, etc
>
> (1) Where on the application of a defendant to an action or other proceeding in the High Court, it appears to the court:
>
> (a) ...;
>
> (b) ...;
>
> (c) subject to paragraph (2), that the plaintiffs address is not stated in the writ or other originating process or is incorrectly stated therein; or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation.
>
> then, if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
>
> (2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the court that the failure to state his address or the misstatement thereof was made innocently and without intention to deceive.
>
> (3) ...;

[17] The defendant has stated in the affidavit in support of the application that both the second and third plaintiffs have given different address at different times.

At the time of the filing of the writ the address of both the second and third plaintiffs were the same namely at No 84, Persiaran Kledang Timur 19, Bandar Baru Menglembu, 31450 Ipoh, Perak. The second plaintiff has two other different addresses which the defendant obtained from the official search at the Jabatan Insolvensi and also from the affidavit filed by him on 10 March 2000. Similarly, the third plaintiff too, following a search done at CTOS Sdn Bhd has a different address in Ipoh, two other different addresses in Kuala Lumpur and one other address in Selangor.

[18] Wong Kong Heow, the second plaintiff affirmed an affidavit on 21 August 2004 (encl 126) on behalf of the plaintiffs in the application and merely reiterated that the different addresses of the second and third plaintiffs are their relevant addresses at the relevant period of time when the documents were filed by them. There is an admission by the plaintiffs that they do in fact have those different addresses. Other than admitting those addresses, the plaintiff contend that having different addresses is not relevant and is not a ground to support the defendant's application for security for costs.

[19] It is to be noted that O 23 r 1 of the Rules of the High Court 1980 is not a carte blanche provision empowering the court to order security for costs in all cases where the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated. To order for security under the said rule the court must have regard to all the circumstances of the case and that the court thinks it is just to do so. Having different addresses per se is not a ground as envisaged under O 23 and there is no evidence to suggest that the plaintiffs have been changing addresses to evade the consequence of the litigation. It is also not suggested that the plaintiffs' address in the writ is incorrectly stated. In the same token there was also no plausible reason or explanation given by the plaintiff as to the existence or usage of the different addresses.

[20] Both the second and third plaintiffs have been declared bankrupts and I can understand the defendant's apprehension over the plaintiffs' ability to meet any order as to costs which the court may make. However, it is trite that the plaintiffs' impecuniousity by itself is not a sufficient ground for the court to make an order for security for costs. Arifin Zakaria J (as he then was) in *Faridah Begum bte Abdullah v Dato Michael Chong* [1995] 2 MLJ 404 at p 409 cited a passage by Bingham CJ in *Thune & Anor v London Properties Ltd & Ors* [1990] 1 All ER 972 at p 979:

> In approaching that question, it cannot be to emphatically stated that impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security. It is not a ground in O 23 r 1(1), and s 726 (1) of the Companies Act 1985, like its predecessor, only applies to limited companies. But I am for my part firmly of opinion that it is a matter which the court may, and in a proper case should, consider in exercising a discretion where power to make an order is established.

[21] Having considered all the circumstances of the case, I am of the view that this is a proper case for this court to exercise its discretion in ordering security for costs

against the plaintiffs. The decision of learned Timbalan Pendaftar ordering the second and third plaintiffs to provide security for costs is hereby affirmed.

QUANTUM

[22] I shall now consider the issue of the amount of security that ought to be ordered against the plaintiffs. The learned Timbalan Pendaftar has ordered the sum of RM20,000 against the first plaintiff and RM10,000 against each of the second and third plaintiffs. The said amount is against each of the applicant and in its totality the first plaintiff will have to fork out RM200,000 against the ten applications while the second and third plaintiff will each have to provide RM100,000 as security for all the ten applications filed against them.

[23] The amount of security for costs to be ordered by the court certainly depends on the facts and circumstances of each case. The security to be ordered should be such as the court thinks in all the circumstances of the case is just. The quantum imposed must not be oppressive upon the plaintiff and it is always a matter that ought to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. The court must always be reluctant to allow applications for security for costs to be used as a measure to stifle proceeding or for some other oblique motives. (*Ashin Sdn Bhd v Datuk Bandar Kuala Lumpur & Ors* [1999] 5 MLJ 663, *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074). Speaking of the court's discretion to allow security for costs, Sir Donald Nicholls VC in *Re Unisoft Group Ltd (No 2)* listed several factors that have weighed with him and at p 536 of the report, his Lordship said:

> Fifthly, the jurisdiction conferred by the statute does not require the court either to award security in a sum equal to the anticipated costs or to make no award at all. It is not a case of either all or nothing. The discretion is wide enough to permit the court to award a sum in between these two extremes if justice and fairness so require. The court has power to order security in full amount of the anticipated costs. The greater includes the less. The court may order a lesser sum.

[24] Abdul Malik Ishak J in *Goldquest International Ltd v TehLeong Kiat* [2003] MLJU 132 had an occasion to deal with the English Court of Appeal case of *Procon (Great Britain) Ltd v Provincial Building Co Ltd & Anor* [1984] 1 WLR 557 on the issue of amount of security and the court's views on the UK Supreme Court Practice 1982 on this subject matter. In conclusion, His Lordship at p 420 of the report had this to say:

> Thus, applying the case of *Procon (Great Britain) Ltd v Provincial Building Co Ltd & Anor* as best as I can, I must say that:
>
> (a) the UK Supreme Court Practice 1982 which recommended a 'skeleton bill of costs' should be taken with a pinch of salt since Stephen Brown U had suggested its removal;

(b) it is the court that will ultimately fix the quantum for security for costs as the court thinks in all circumstances of the case to be just; and it is for the defendant to put before the court sufficient material to enable the court to decide the quantum for the security for costs.

[25] I fully associate myself with the views expressed therein. Reverting to the fact and circumstances of the case before me, the four defendants has sought for security for costs against the first, second and third plaintiff in the sum of between RM250,000 and RM300,000. The fourth defendant solicitors have also put up a draft bill of costs for RM250,000. The plaintiffs' claim in this suit runs in the millions of ringgit and there are four other suits between the parties. The first plaintiff is in liquidation while the second and third plaintiffs are bankrupts. There are numerous other interlocutories still pending in court and likewise a similar situation in the other four suits. Although a sum of RM2,000 has been ordered as security for costs by the Jabatan Insolvent against the first plaintiff, this sum is far too low in the circumstances of the case. In any event, it is meant for the Jabatan Insolvent and it is not a security for costs for the defendant applicants in the instant case. I fully agree with the learned Timbalan Pendaftar that the amount of between RM250,000 to RM300,000 sought for by the defendant is excessive and would be oppressive to the plaintiffs as they are and considering further of the number of applications filed by the different defendant against them. In the light of those circumstances, I am of the view that the amount of RM20,000 ordered by him against the first plaintiff and RM10,000 against each of the second and third plaintiffs as security for costs is a reasonable amount. I see no valid reason for me to interfere with the exercise of discretion by the learned Timbalan Pendaftar in arriving at the figure. It is trite law that an appellate court will not interfere in the exercise of discretion by the lower court unless such exercise of discretion had been premised on wrong grounds (see *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 85).

[26] Accordingly, the appeal by the first, second and third plaintiffs against the order of the Timbalan Pendaftar is hereby dismissed with costs. The appeal by the fourth defendant in encl 162 is also costs. The appeal by the fourth defendant in encl 162 is also dismissed with costs and so do the six other appeals in the other suits.

Appeal dismissed.

Reported by Loo Lai Mee